IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORIDINARY ORIGINAL CIVIL JURISDICTION

NOTICE OF MOTION NO.129 of2005
IN
NOTICE OF MOTION NO.113 OF 2005
IN
TESTAMENTARY SUIT NO. 41 OF 2005
IN
TESTAMENTARY PETITION NO.481 OF 2004

ALONGWITH

NOTICE OF MOTION NO.130 of2005
IN
NOTICE OF MOTION NO.112 OF 2005
IN
TESTAMENTARY SUIT NO. 43 OF 2005
IN
TESTAMENTARY PETITION NO.480 OF 2004

Leelavati Jayendra Mehta .. Deceased

Vijay Jayendra Mehta .. Petitioner

V/s.

Shobha B. Shah .. Caveatrix

And

Bank of India .. Respondent/ Applicant.

Mr.H.B.Dasondi for the Petitioner

Ms.Kalyani Parmar for the Caveatrix

Mr.Satish Shetye i/b.M.S.Bodhanwala & Co. for the Respondent Bank

Coram : S.R.Sathe, J.
Dated : 21st Nov., 2005

P.C.

1. Heard learned Counsel for the parties at length. Perused the record.

2. As common question of facts and law are involved in the above mentioned four Notice of Motions, the same are being disposed of by this common order.

3. Brief facts giving rise to these Notice of Motions are as under:

. The property in question i.e. bungalow at 16 Laxmi Estate. Gopal Chowk, Mani Nagar, Ahmedabad was initially owned by one Jayendra A. Mehta. He executed a Will on 24.1.1989 and died on 17.10.1990. It is alleged that he had executed a codicil on 21.2.1989. He left behind him son Vijay i.e. the present petitioner and three daughters. His wife had predeceased him.

4. The present Petitioner, Vijay Jayendra Mehta had taken some loan from the Bank of India, Respondent in Notice of Motion Nos.112 of 2005 & 113 of 2005. An amount of Rs.964 lakhs was due from the Petitioner Vijay J. Mehta to the said bank. The

Bank of India therefore filed O.A.120 of 2004 before the Debt Recovery Tribunal and Notice under Section 13(2) was issued under The Securitisation And Reconstruction Of Financial Assets and Enforcement of Security Interest Act, 2002 (hereinafter referred to as the Sarfaesi Act) and ultimately Public Auction took place on 16.8.2005 in respect of the property in question and the bidder/purchaser even paid the earnest money.

5. After issuance of the said notice the Petitioner Vijay Mehta filed two Testamentary Petitions, one No.481 of 2004 seeking probate in respect of the Will of his father, and the other testamentary petition bearing No.480 of 2004 claiming probate in respect of the Will executed by his mother. When the Caveatrix, sister of the Petitioner came to know about the notice issued in Gujrati Newspaper, regarding auction of the property she filed Notice of Motion bearing Nos.112 of 2005 and 113 of 2005 in this Court and submitted that the purported will relied upon by the Petitioner is bogus, irrantional and unjustifiable. Deceased had infact not bequeathed the property in favour of the petitioner. Petitioner had no right to mortgage the said property with the Bank of India and if the Bank

of India is allowed to sell the said property that will jeopardised her rights. She, therefore, prayed that pending the hearing and final disposal of the testamentary petitions filed by the Petitioner, the respondent bank be restrained from taking any action in furtherance of the public notice inviting tenders for auction of property in question i.e. bungalow at Ahmedabad and the property at Mumbai namely shop no.3 Meenakshi Apartment, Opposite Dockyard Road Station, Mazgaon, Mumbai, which is included in the Schedule 1 of the testamentary petition. She further prayed that the respondent Bank of India as well as the petitioner be restrained from dealing in any manner with the property of the deceased Jayendra Ambalal Mehta as well as his wife Leelawati J. Mehta.

6. After hearing the learned Advocate for the caveatrix, this Court (Coram A.S.Aguiar, J.) granted ad-interim relief in favour of the caveatrix and against the respondent bank and restrained them from taking any further steps in pursuance of the public notice mentioned above.

7. The Bank of India, therefore, appeared and opposed the notice of Motions filed by the caveatrix

and also filed separate Notice of Motion bearing No.129 of 2005 for vacating the order passed in Notice of Motion 113 of 2005 and Notice of Motion No.130 of 2005 for vacating the order passed in Notice of Motion 112 of 2005. It is the case of Bank of India that the properties mentioned above have been mortgaged by the Petitioner Vijay Mehta. As huge amount was due from the Petitioner, the Plaintiff bank put the said properties for auction in pursuance of the action taken under section 13 (2) of the SARFAESI Act and as per section 34 of the said SARFAESI Act, this testamentary Court has in fact no jurisdiction to issue injunction against the bank who is taking action as per the provisions of SARFAESI Act. The bank also contended that if the caveatrix had any grievance she ought to have filed necessary proceeding before the Debt Recovery Tribunal or before the DRAT as per the provisions of Section 17 of the SARFAESI Act. The bank also contended that it is only with a view to defeat their claim and action the Petitioner and his sister i.e. the present caveatrix in collusion with each other have filed the probate proceeding and subsequently the notice of motion through the caveatrix. The bank, therefore, prayed that interim injunction granted against them be vacated.

8. The relationship between the petitioner and the caveatrix is not in dispute. It is also not disputed that the two properties mentioned above were owned by the parents of the petitioner and caveatrix. Admittedly, mother of the petitioner and caveatrix pre-deceased Mr. Jayendra Mehta. There is nothing on record to show as to why the petitioner and/or his sister did not take immediate action for obtaining probate in respect of the will executed by their parents. It appears that for period of about 15 years they have not taken any action. It is pertinent to note that in this testamentary petition the petitioner has even not produced the original will and is only relying on one true copy of the will alleged to have been notarised by the notary. However, we do not find proper endorsement on the said copy also. The Petitioner Vijay has not even filed the affidavits of the witnesses who have attested the will. All these circumstances, infact prima facie create a doubt about the genuineness of the will. However, merely because of this it is not necessary for this court to restrain the Bank of India from dealing with the properties mentioned above.

9. It is needless to say that the jurisdiction of the testamentary Court is very limited. In this probate proceedings Court cannot go into the question of title. The primary function of the probate court is to ascertain and deal with the factum and due execution of the will. This court cannot go into the question as to under what circumstances petitioner Vijay Mehta mortgaged the property in question to the Bank of India or whether he had exclusive right to mortgage the said property. Naturally, if it is the contention of the caveatrix that she is having right in property in question and the petitioner alone had no right to mortgage the property, she could have taken this point before the concerned authority namely D.R.T. or D.R.A.T. but we find that the caveatrix knowing well that the Bank of India proceeded in accordance with the provisions of the SARFAESI Act, did not file any proceedings before the said authority. So, having regard to the provisions of Section 17 and 39 of the said Act, I think that this is not a fit case where this Court can restrain the Bank of India from taking any further steps in the proceedings which are initiated by them under the SARFAESI Act.

10. As the caveatrix is asking for the order

restraining the Bank of India from taking any steps in the proceedings initiated by them against the petitioner Vijay Mehta it is necessary to find out whether the caveatrix has made out a good primafacie case for granting such injunction and whether the balance of convenience is in her favour. She has not made out any prima facie case for grant of injunction as prayed. If at all the caveatrix is having any interest in the property, she may move the proper Court and forum for the same. Granting injunction as prayed by the caveatrix would result in delaying the proceedings before the D.R.T. and it would create hurdle in the action taken by the bank for the recovery of their dues. So, under such circumstances I am not inclined to grant injunction as prayed by the caveatrix. It is, therefore, necessary to reject the notice of motions filed by the caveatrix and to allow the notice of motions filed by the Bank of India.

11. In this view of the matter, ad-interim injunction granted earlier against the Bank of India in notice of motion Nos.112 of 2005 and 113 of 2005 is vacated in respect of the two properties in question namely the bungalow situated at 1B Laxmi Estate, Gopal Chowk, Mani Nagar, Ahmedabad and the

Shop No.3 situated at Meenakshi Apartment, Opposite Dockyard Station, Mazgaon, Mumbai.

12. The learned advocate for the petitioner Shri Hemanshu Dasondi submits at Bar on behalf of the petitioner that the petitioner Vijay Mehta will not create any encumbrance on the other properties mentioned in the schedule will not transfer or enter into any transaction in respect of those properties thereby jeopardising the rights of the caveatrix and his other three sisters.

13. Notice of Motion No.112 of 2005, 113 of 2005, 129 of 2005 and 130 of 2005 are disposed of in the above terms.

(S.R. Sathe, J.)